

APPLICATION FOR

**DISTRICT COURT JUDGESHIP  
4th Judicial District**

**A. PERSONAL INFORMATION**

1. Full Name: **Shane Anthony Vannatta**

a. What name do you commonly go by? **Shane**

2. Birthdate: [REDACTED] Are you a U.S. citizen? **Yes**

3. Home Address: [REDACTED] Phone: [REDACTED]

4. Office Address: **111 N Higgins Ave Ste 600, Missoula, MT 59802**

Phone: **406-721-3400**

5. Length of residence in Montana: **40 years**

6. List your place of residence for the last five years:

Dates

City

State

[REDACTED]

**Missoula**

**MT**

## B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended, beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Bainville Public High School	Bainville, MT	May 1986	H.S. Diploma
University of Montana	Missoula, MT	June 9, 1990	B.A. in Political Science (with High Honors)
University of Montana	Missoula, MT	May 15, 1993	J.D. (with Honors)

8. List any scholarships, awards, honors and citations that you have received:

As a student, I received the Fox Foundation Scholarship (1986-90); selection to the 1988 UM Homecoming Court; the designation as a College of Arts & Sciences Scholar (top 12% of students in CAS) (1989-90); selection for Mortar Board (an honorary, society) (1989-90); and selection to UM Silent Sentinel (a secret, honorary, altruistic society of 12 students) (1989-90).

As an attorney, I have been honored by recognition in:

The [2013 Mountain States Super Lawyers](#)® for Business Litigation;

The [2014 Best Lawyers in America](#)® for Commercial Litigation, Copyright Law, Corporate Law, Litigation – Intellectual Property, Litigation – Labor & Employment, Litigation – Real Estate, and Trademark Law. I was also selected as the *Best Lawyers 2014* Missoula Litigation - Labor & Employment “Lawyer of the Year”; and

[Martindale-Hubbell](#)® with a BV Rating in Business Law and Litigation.

9. Were you a member of the Law Review? If so, please state the title and citation of any article that was published and the subject area of the article.

Yes, I was a member of the Montana Law Review from 1991-93; I served as a staff member (citation checker) my first year (1991-92), and later as an Editor and Business Manager (1992-93). I published a case note entitled: *Recognizing Parental Consortium: Montana Follows a Trend in Pence v. Fox*, 54 Mont. L. Rev. 149 (1993). The subject area was torts.

### C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
<b>State Courts and the Supreme Court of Montana</b>	<b>Sep. 21, 1993</b>
<b>U.S. District Court for the District of Montana</b>	<b>Oct. 5, 1993</b>
<b>U.S. Ninth Circuit Court of Appeals</b>	<b>May 30, 2012</b>

11. Indicate your present employment (list professional partners or associates, if any).

**I am a shareholder-attorney with Worden Thane P.C. (formerly known as Worden, Thane & Haines, P.C.). I have the pleasure of practicing law with the following partners and associates: Ronald A. Bender, Patrick G. Frank, Martin S. King, Patrick Dougherty, W. Carl Mendenhall, Gail M. Haviland, Peter S. Dayton, Sean M. Morris, Reid J. Perkins, William E. McCarthy, Matthew J. Cuffe, Jane E. Cowley, Colleen M. Dowdall, Amy M. Scott Smith, Jori Quinlan, Jesse C. Kodadek, and Chris A. Johnson.**

12. State the name, dates and addresses of all law firms with which you have been associated in practice, all governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
<b>Worden Thane P.C. (fka Worden, Thane &amp; Haines, P.C.)</b>	<b>Associate Attorney &amp; Shareholder Attorney</b>	<b>Sep 1993 - Present</b>

13. If you have not been employed continuously since the completion of your formal education, describe what you were doing.

**Not applicable.**

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

**My legal practice is focused principally in business law and litigation. I provide a wide-range of business formation and development advice, including advice for copyrights, trademarks, trade secrets, employment, business acquisitions, and contract drafting. I have assisted numerous clients with real estate sales and acquisitions, and represented clients in a variety of civil litigation matters. I have helped numerous employers prepare employee policy manuals, implement policy, and manage employees, including when separation from employment is necessary.**

**The following is a break-out of my practice from the past year:**

3%	Civil Litigation: Plaintiff
3%	Civil Litigation: Defense
23%	Contract Negotiation, Drafting & Review
12%	Copyright/Trademark/Trade Secret (and related litigation)
19%	Corporation/Business Formation/Mergers & Acquisitions
3%	Estate Planning
6%	General Counsel – Miscellaneous advice related to business operations, agency, business development, etc.
10%	Labor Law/Employee Relations (and related litigation)
15%	Probate & Trusts (and related litigation)
6%	Real Estate
100%	

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

**Although not reflected in the break-out above, I have also practiced in the following areas: securities (exempt offerings), collections & foreclosures, family law, and oil & gas law.**

16. If you specialize in any field of law, what is your specialty?

**I am known for my intellectual property expertise (copyrights, trademarks, trade secrets). I have advised a number of high-tech (and other) companies on protecting and managing their IP. I also regularly receive referrals for employment law issues (both employee and employer), and have negotiated several severance agreements with executive employees.**

17. Do you regularly appear in court? **No. I typically don't have the opportunity.**

What percentage of your appearance in the last five years was in:

Federal court	5 %
State or local courts of record	90 %
Administrative bodies	5 %
Other	0 %

18. During the last five years, what percentage of your practice has been trial practice? <2 %

19. How frequently have you appeared in court? <1\* times per month on average.

20. How frequently have you appeared at administrative hearings?  
<1 times per month on average.

21. What percentage of your practice involving litigation has been:

Civil	100 %
Criminal	0 %
Other	0 %

22. Have you appeared before the Montana Supreme Court within the last five years? If so, please state the number and types of matters handled. Include the case caption, case citation (if any), and names addresses and phone numbers of all opposing counsel for the five most recent cases.

**Yes, I have had three cases that were appealed to the Montana Supreme Court in the past five years. In each case, I represented an appellee (party defending the lower court's decision). The cases are as follows:**

<u>Case Name</u>	<u>Citation</u>	<u>Opposing Counsel</u>	<u>Comment</u>
<b>In re Estate of Louis G. Hannum, Sr., Deceased (DA 12- 0003)</b>	<b>2012 MT 171, 366 Mont. 1, 285 P.3d 463</b>	<b>Don C. St. Peter, Esq. St. Peter Law Offices, P.C. 2620 Radio Way Missoula, MT 59808 (406) 728-8282  Naomi R. Leisz, Esq. Leisz Law Office, P.C. 2977 Highway 200 Trout Creek, MT 59873 (406) 827-8600</b>	<b>The issue was whether the Personal Representative was rightfully removed for cause by the District Court. The Supreme Court affirmed and we prevailed.</b>
<b>In re Estate of Lilliane M. Greene, Deceased (DA 12-</b>	<b>2013 MT 174, 370 Mont. 490, 305 P.3d 52</b>	<b>Don C. St. Peter, Esq. St. Peter Law Offices, P.C. 2620 Radio Way Missoula, MT 59808 (406) 728-8282</b>	<b>The issue was whether the District Court properly denied the motion for substitution of</b>

0735)			judge. The Supreme Court affirmed and we prevailed.
In re Estate of Louis G. Hannum, Sr., Deceased (DA 14-0420)	<i>Pending</i>	Don C. St. Peter, Esq. St. Peter Law Offices, P.C. 2620 Radio Way Missoula, MT 59808 (406) 728-8282  Naomi R. Leisz, Esq. Leisz Law Office, P.C. 2977 Highway 200 Trout Creek, MT 59873 (406) 827-8600	The issue is whether the District Court properly denied an heir's late objection to the Decedent's last will.

23. State the number of jury trials that you have tried to conclusion in the last ten years. **9 (where I served as the judge)**

*As a private practice attorney, I have had NO jury trials in the last ten years. However, I have tried the following jury trials as the justice of the peace pro tem for Missoula County Justice Court, Dept. II:*

State of Montana vs. Trimble, Kay	(DUI)	10/17/2011
State of Montana vs. Allensworth, David	CR-10-7114-CS (Careless driving, and resisting arrest x 2)	9/27/2010
State of Montana vs. Lane	(DUI)	6/19/2007
State of Montana vs. Brubaker, James Wesley	CR-2007-3091-C2 (Partner Family Member Assault)	4/5/2007
State of Montana vs. Hendrickson, Michael E.	CR-2005-0000090-C2 (DUI)	2/27/2006
State of Montana vs. Byland, Victor	TK-2005-0001649-T2 (DUI)	2/21/2006
State of Montana vs. Rowe, Richard	TK-2005-3608-T2	11/29/2005
State of Montana vs. Parker, Pamela		10/21/2005
State of Montana vs. Ellis		4/29/2004

24. State the number of non-jury trials that you have tried in the last ten years.

As a private practice attorney, I have had only 1 bench trial in the last ten years:

<b>Kipp and Montana High Country Tours, Inc. Vs. ASCORP Inc. d/b/a DEBCO Construction</b>	<b>Beaverhead Co. Cause No. DV-07-13091, Judge Tucker, Presiding (Breach of contract)</b>	<b>8/25-27/2009</b>
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However, I have tried the following bench trials to conclusion as the justice of the peace *pro tem* for Missoula County Justice Court, Dept. II:

<b>State of Montana vs. Spencer, Shaun</b>	<b>(DUI)</b>	<b>5/1/2014</b>
<b>Mahannah vs. Kaprich</b>	<b>(Landlord-Tenant)</b>	<b>5/1/2013</b>
<b>Caras Property Management vs. Toney, Ron</b>	<b>(Landlord-Tenant)</b>	<b>4/28/2011</b>
<b>State of Montana vs. Lane</b>	<b>(DUI)</b>	<b>6/19/2007</b>
<b>Professional Property Management vs. Eickert</b>	<b>(Landlord-Tenant)</b>	<b>5/18/2006</b>
<b>Moore vs. Sunstedt</b>	<b>(Landlord-Tenant)</b>	<b>10/12/2007</b>

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Please include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, give the same information regarding opposing counsel and the nature of the matter.

<b>Caption or Nature of the Matter</b>	<b>Attorney and Contact Information</b>	<b>Presiding Judge</b>
<b>In re Estate of Louis G. Hannum, Sr., Deceased</b>  <b>No trial; only hearings.</b>	<b>Don C. St. Peter, Esq. St. Peter Law Offices, P.C. 2620 Radio Way Missoula, MT 59808 (406) 728-8282</b>	<b>Hon. D. Kim Christopher 20th Judicial District (406) 883-7360</b>
<b>In re Estate of Lilliane M. Greene, Deceased</b>  <b>No trial or hearings.</b>	<b>Don C. St. Peter, Esq. St. Peter Law Offices, P.C. 2620 Radio Way Missoula, MT 59808 (406) 728-8282</b>	<b>Hon. Karen S. Townsend 4th Judicial District (406) 258-4774</b>

<b>Resolution of a UCC Sale of Goods Issue</b>	<b>Daniel J. Auerbach, Esq. Browning Kaleczyc Berry &amp; Hoven P.C. 201 W Railroad St Ste 300 Missoula, MT 59802-4291 (406) 728-1694</b>	<b>None.</b>
<b>Negotiation and memorialization of severance agreement</b>	<b>Stacey Weldele-Wade PO Box 8011 Helena, MT 59604 406-329-1314</b>	<b>None.</b>
<b>Negotiation and memorialization of severance agreement</b>	<b>Todd Shea, Esq. Shea Law Office 225 E Mendenhall St Bozeman, MT 59715-3637 (406) 587-3950</b>	<b>None.</b>
<b>Negotiation of a termination of independent contractor agreement and sales agreement</b>	<b>Ryan “Nick” Jones, Esq. Bjornson Law Offices 2809 Great Northern Loop, Ste 100 Missoula, Montana 59808 (406) 721-8896</b>	<b>None.</b>

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

**The adversary proceedings I’ve conducted in the past five years have all involved employment or labor issues, namely the defense of a prevailing wage audit, the defense of two labor arbitrations against a community college, the defense of an unfair labor practice against a community college (different college than in the arbitrations), and the defense of a municipality against a human rights claim (discrimination). All matters, except the human rights claim, went to trial or hearing, resulting in judgments. In the case of the two labor arbitrations, they were multi-day trials.**

**Also worth mentioning is my service to the State Bar of Montana’s Fee Arbitration service. In the past five years, I have served on three separate fee arbitration panels (all as Chair of the panel) to review and determine the appropriateness of a disputed attorney fee. This service was established by the Montana Supreme Court and is administered by the State Bar. Each of these fee arbitrations took about a day, required the taking of testimony and exhibits, and resulted in a written decision (prepared by me).**

27. If you have published any legal books or articles, other than Law Review articles, please list them, giving citations, dates, and the topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, please state the date, topic and group to which you spoke.



As President of the State Bar of Montana, I authored 10 President's Messages, which were published in the *Montana Lawyer* (Aug 2011 – Sep 2012): (see the following webpage if the links below are not active -- <http://www.wordenthane.com/pages/2011-2012-state-bar-of-mt-presidents-messages.php>)

[\*Enough With Civility! Try Kindness\*](#) (Aug) (On civility in the practice of law)  
[\*Lead The Public In Service\*](#) (Oct) (On the need to get involved and serve)  
[\*Own Up To Your Mistakes\*](#) (Nov) (On apologizing for professional mistakes)  
[\*Take a Lawyer to Lunch!\*](#) (Dec) (On attorney relationships and communication)  
[\*Time's Inexorable Advance\*](#) (Feb) (On aging and retirement)  
[\*Sharpen The Saw\*](#) (Mar) (On vacationing and personal renewal)  
[\*Attitude and Satisfaction in the Practice\*](#) (Apr) (On maintaining a healthy attitude)  
[\*The Measure of Success\*](#) (May) (On defining personal success)  
[\*At Some Time in Our Lives We are All a One\*](#) (Jun) (On diversity and acceptance)  
[\*You Have a Choice\*](#) (Sep) (On our ability to choose how we practice law)

I've presented at numerous continuing legal education seminars and non-CLE events. Below is a list of presentations for the past 5 years:

Vannatta, S., Jensen, C. & Phelan, R. (2014), *60 Tech Tips in 60 Minutes*. State Bar of Montana (CLE)

Vannatta, S. (2014), *Employee Handbooks and Policy Manuals*. Missoula Job Service Employers Council (Non-CLE)

Vannatta, S. (moderator), Hatalsky, L., Moulton, B. & Sawyer, H. (2013), [\*Ramifications of Same-Sex Marriage Rulings: What Should Congress Do?\*](#) ABA Center for Professional Development, Webinar (Non-CLE)

Vannatta, S. (2012), *Who Is Your Client? Representing the Corporate Client and Conflicts of Interest*. Northwestern Montana Bar Association, Kalispell, MT (CLE)

Vannatta, S. (2012), *Hot Topics In HR Law*. Big Sky Society for Human Resource Management, Missoula, MT (Non-CLE)

Vannatta, S. & Brandborg, B. (2012), *Updates on Law Practice Closure*. Montana Judges Association, Great Falls, MT (Non-CLE)

Vannatta, S. (2011), *Practical Business Considerations for Trademark & Copyrights*. Northwestern Montana Bar Association, Kalispell, MT (CLE)

Vannatta, S. (2010), *Medical Marijuana in the Workplace*. Missoula Area Chamber of Commerce, Missoula, MT (CLE)

Vannatta, S. (2010), *Medical Marijuana: Dazed and Confused*. State Bar of Montana, Great Falls, MT (CLE)

Vannatta, S. (2010), *Ethical Issues in Foreclosure*. State Bar of Montana, Fairmont Hot Springs, MT (CLE)

## **D. PROFESSIONAL AND PUBLIC SERVICE**

28. List all bar associations and legal professional societies of which you are a member and give the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

### ***American Bar Association***

**ABA Delegate for the State Bar of Montana** (Dec 2012 – Present)  
**Commissioner, ABA Commission on Sexual Orientation & Gender Identity** (Sep 2012 – Present) (an ABA Presidential Appointment), **Chair of the Advocacy Sub-Committee** (Sep 2014 – Present)  
**Member** (1994 – Present)

### ***State Bar of Montana***

**Immediate Past-President** (Sep 2012 – Sep 2013)  
**President** (Sep 2011 – Sep 2012)  
**President-Elect** (Sep 2010 – Sep 2011)  
**Chair of the Board of Trustees** (Sep 2008 – Sep 2010)  
**Chair, Past-President's Committee of the State Bar of Montana** (Sep 2013 – Sep 2014)  
**Chair, Professionalism Committee** (2004 – 2010), **Member** (1999 – Present)  
**Chair, New Lawyers Section of the State Bar of Montana** (1995 – 1996)  
**Member** (1993- Present)

### ***Western Montana Bar Association***

**President** (2000 – 2001)  
**Vice-President** (1999 – 2000)  
**Secretary** (1998 – 1999)  
**Treasurer** (1997 – 1998)  
**Chair, WMBA Pro Bono Committee** (2003 – 2009)  
**Member** (1993 – Present)

### ***Missoula New Lawyers Association***

**President** (1993 – 1995)

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. Please state the title and date of any office that you have held in each organization. If you held any offices, please describe briefly your activities in the organization.

**Class Member, 2015 Leadership Montana** (*Anticipated Graduation May 2015*)  
**Visitor, UM School of Law Board of Visitors** (2011 – Present)  
**Chair, Missoula Chamber Ambassadors** (2009 – 2010), **Member** (2005 – Present)  
**Member, UM Alumni Association, Lifetime Member** (2000 – Present)  
**Member, Missoula City Building Code Board of Appeals** (1999 – 2002)  
**Chair, Leadership Missoula 16, Missoula Area Chamber of Commerce** (1999 – 2000)  
**Loaned & In-House Campaign Executive for United Way of Missoula Co.** (1994 – 2002)

30. Have you ever run for or held public office? If so, please give the details.

**No. The closest I have come to elected public office was running in contested elections for a trustee position for the State Bar of Montana. I ran an unopposed election for the President of the State Bar of Montana.**

43. Please explain your philosophy of public involvement and practice of giving your time to community service. (*I've moved this question and answer to this section (from the "F. BUSINESS AND FINANCIAL INFORMATION" section) since it made more sense here.*)

**Public involvement and service are essential facets of good citizenship and being a good person. Selfish interest can directly benefit only a few. Public service is necessary to fill-in the gaps and meet the interests and needs of the greater whole. Our community, state and nation are only lifted up by the constant actions of individuals committed to doing more than satisfying their own needs and wants.**

**My volunteer public service has been dedicated principally to the betterment of our legal profession, and to leadership development. For the last 5 years or more, I have volunteered over 200 hours of time *each year* in service to bar-related activities. Frankly, I've received far more satisfaction and personal fulfillment from my bar service that I feel I've invested. I've had the joy of meeting incredible people with a self-sacrificing attitude and commitment to leaving the world a better place.**

**People who know me well, recognize my frequent use of quotes as inspiration. Indeed, a quote I used in one of my President's messages aptly sums up my approach to public service:**

*I expect to pass through life but once. If therefore, there be any kindness I can show, or any good thing I can do to any fellow being, let me do it now, and not defer or neglect it, as I shall not pass this way again.*

**– William Penn**

## **E. PROFESSIONAL CONDUCT AND ETHICS**

31. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, give the particulars.

**No.**

32. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, please explain.

**No.**

33. Have you ever been arrested or convicted of a violation of any federal law, state law, county or municipal law, regulation or ordinance? If so, please give details. Do not include traffic violations unless they also included a jail sentence.

**No.**

34. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, please give details.

**No.**

35. Is there any circumstance or event in your personal or professional life which, if brought to the attention of the Commission, the Governor or the Montana Supreme Court would affect adversely your qualifications to serve on the court for which you have applied? If so, please explain.

**No.**

## F. BUSINESS AND FINANCIAL INFORMATION

36. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, please give details, including dates.

**Landlord (1996 – Present) – I own, rent and manage a total of 6 units of residential real property with my spouse.**

**Property Management (2011 – Present) – I manage and rent a total of 3 units (residential tenements) for my mother (2 units since 2011) and brother (1 unit since 2013).**

37. If you are an officer, director, or otherwise engaged in the management of any business, please state the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

<u>Position</u>	<u>Business Name</u>	<u>Nature of Business and Duties</u>	<u>Will I Resign Immediately Upon Appointment</u>
<b>Vice-President &amp; Director</b>	<b>Worden Thane P.C.</b>	<b>Legal services; I assist with managing the law firm.</b>	<b>Yes, I will resign immediately.</b>
<b>President &amp; Director</b>	<b>Rohepofalchz Condominium Association</b>	<b>I assist with managing this 2 unit condominium in which I own a unit, and my brother owns a unit.</b>	<b>No, I do not intend to resign.</b>
<b>Property Manager</b>		<b>Residential real property management; I assist with managing a total of 9 units – 6 units my spouse and I own; 3 units are owned by family (mother and brother)</b>	<b>No, I do not intend to resign.</b>
<b>General Partner (1%)</b>	<b>C5 Rodeo MT, LLLP</b>	<b>This is a temporary appointment while my Canadian client obtains an International Tax Identification Number from the IRS.</b>	<b>Yes, I will resign immediately (if not done before the appointment).</b>
<b>Director</b>	<b>Northern Rockies Ethnobotany Center</b>	<b>This non-profit corporation was dissolved Dec 1, 2004. I had no active role in managing this non-profit.</b>	<b>I have resigned.</b>

38. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, please identify the source and the approximate percentage of your total income it constituted over the last five years.

**I have received compensation from the following non-legal business enterprises or organizations. All percentage calculations are based upon gross wages and gross income.**

<u>Business</u>	<u>% of Income</u>	<u>Explanation</u>
<b>KMV Limited Partnership</b>	<b>2014 - 23% (est.) 2013 - 21% 2012 - 1% 2011 - 9% 2010 - 0%</b>	<b>This limited partnership was formed by my mother to manage mineral interests she owns in eastern Montana and western North Dakota. I was gifted a 10% LP interest, and receive distributions arising from the leasing of mineral interests, and payment of royalties from producing oil wells.</b>
<b>Rental of Residential Real Property (for Self)</b>	<b>2014 - 17% (est.) 2013 - 21% 2012 - 24% 2011 - 20% 2010 - 22%</b>	<b>This income was in the form of rental payments for 6 units owned and managed by my spouse and me.</b>
<b>Management of Residential Real Property (for Others - Family)</b>	<b>2014 - 1% (est.) 2013 - &lt;1% 2012 - &lt;1% 2011 - 0% 2010 - 0%</b>	<b>This income arises from the management fees my spouse and I charge my mother and brother for the management of their residential rental property. We charge a fee of 8% of gross rents as memorialized in a management agreement.</b>

39. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or which in any manner or for any reason might embarrass you? If so, please explain.

**No.**

40. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? **Yes.**

If not, please explain. **Not applicable.**

41. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)? **No.**

If yes, please explain. **Not applicable.**

42. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, please give details.

**No.**

## G. WRITING SKILLS

44. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. Please state if associates or others have generally performed your research and the writing of briefs.

**For most of my career, I have completed my own research and writing. In the past 5 years or so, I have delegated about 15%-20% of my research and writing work to interns and associates, who start the process. I spend substantial time heavily-editing any legal writing performed by others which I file with courts or administrative agencies.**

45. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., please explain the type and extent of writing that you have done.

**Nearly every day of my practice is filled with the preparation of advice-filled emails or letters. I am frequently researching the applicable law responsive to a client question, and then applying the facts in a written response. Such explanations are obviously more basic without “legalese”, but for purposes of malpractice and to provide my clients with sources, I include citation (and often quotes) of the applicable case law and statutes.**

**Additionally, I draft numerous contracts and related agreements on a weekly basis. This drafting gives me a healthy respect for word-choice and precision. My motto is: “good relationships come from clear expectations that are reflected in understandable and well-written agreements”.**

46. Please attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable.

**Please see *Exhibit A*.**

47. What percentage of your practice for the last five years has involved research and legal writing?  
**50 - 60 %**

48. Are you competent in the use of Westlaw and/or Lexis?

**I am proficient with Westlaw; I have not used Lexis/Nexis since law school. I am slowly developing proficiency with FastCase, the new legal research service provided through the State Bar of Montana.**



## H. MISCELLANEOUS

49. Briefly describe your hobbies and other interests and activities.

To balance the cerebral and often desk-bound practice of law, my hobbies are typically athletic in nature. I started practicing Taekwondo during my senior year of undergraduate studies and have continued that practice (with a few periods of hiatus) to the present. I currently hold the rank of 4th Dan (degree) Black Belt, which is a master instructor level. Through Taekwondo, I have taught numerous students. In 1995, I received an “Outstanding Instructor of the Year” Award from UM Big Sky Taekwondo.

I also enjoy walking, hiking, biking, weight-lifting, and down-hill skiing.

50. Describe the jobs that you have held during your lifetime.

For a better understanding of my work and personal background, you may find it useful to read my profile in the *Montana Lawyer* (November 2011) attached as *Exhibit B*.

I was raised on the family farm north of Bainville, MT, so my first job was chores. At the age of 7, I was assigned care of the chickens (feeding, watering and picking the eggs). I successively graduated to sheep, pigs, and cattle as I matured. On the farm, I also performed all the tasks of an agricultural life – fencing, summer-fallowing, haying (including bucking hay and straw bales), harvesting, tending the animals, branding, butchering, cleaning pig pens and chicken coops and barns, milking the cow (her name was Esther), herding cattle and sheep, etc. During the summers, a full work-day started at 6 AM, and lasted until 10 PM.

My first, off-the-farm job was working for a neighbor swathing, raking and bailing hay. These jobs were often erratic and only available during lulls in our regular farm work.

After graduating from Bainville High School, I spent two summers working at the McDonald’s in Williston, ND. I typically worked the breakfast shift (5 AM – 1 PM). A point of pride was working my way up to “crew trainer” during the second summer. The position of crew trainer came with free meals, and 20 pounds of weight added to my frame.

During my undergraduate years at UM (1986-1990), I worked in the Research Administration Office through work-study grants. I processed grant announcements for delivery to interested faculty and staff, developed (programmed and populated) the university's grant proposal and award database, and served as interim office secretary during the regular secretary's maternity leave.

Also during my undergraduate years at UM, I served as a Resident Assistant in Aber Hall (1988-89), and the Head Resident of Craig Hall (1989-1990). As Head Resident, I managed a multi-million dollar complex housing 350 students, and supervised a student and clerical staff of 15 people. I served as a counselor, referral agent, resource person, and hall disciplinarian for students and staff, providing assistance to residents in such areas as alcohol/drug addiction, bulimia, date-rape, sexual assault, suicide, and grief-counseling.

I interned with Worden Thane P.C. my 2<sup>nd</sup> and 3<sup>rd</sup> years of law school (1991-93). WT structured its intern program differently than most private firms, and my duties were not relegated to merely researching and writing memoranda. Rather, I assisted with a wide variety of matters that included direct client contact, witness interviews, etc. During my 3<sup>rd</sup> year of law school, WT assigned me an administrative wage claim to pursue using the student-practice rule. I had my first taste of litigation success working on an overtime wage claim with minimal attorney supervision. I worked-up and tried the case through administrative hearing to administrative appeal (before the Board of Personnel Appeals). The case involved a chef who had been paid as an exempt employee instead of hourly; he had worked about 60 hours per week on average (i.e. 20 hours per week for which he did not receive overtime compensation). We were successful at both the hearing level and on appeal. I was thrilled to obtain the \$4,739 judgment and recover attorney fees (my fees of about \$2,000) against the employer.

My job for the past 21 years has been as an attorney with Worden Thane P.C. (1993-Present). As such, I have

- Provided practical, result-oriented advice and representation to the firm's diverse clientele in business, business sales, commercial litigation, contracts, copyrights, employment, labor, probate litigation, real property, trademarks, trade secrets, and general civil litigation.
- Negotiated, investigated, and memorialized numerous, large, multi-million dollar real estate and business sale transactions from start to successful close.
- Developed and implemented strategies through (pleading, motion practice and oral argument) for several complex cases in federal and state jurisdictions and successfully-settled most of the cases.
- Prosecuted numerous domain-name cyber-squatting matters through ICANN arbitration; defended wrongful discharge and labor disputes through arbitration.
- Assessed, selected, recommended and implemented all firm-wide technology as a member of the firm's technology committee (1994 - Present).
- Advised the firm's attorneys as in-house professional responsibility expert.
- Chaired multiple State Bar Fee Arbitration Panels to resolve attorney-client fee disputes.

Finally, although not paying jobs, I feel it is important to note two areas of service that certainly qualify as work:

- A. My volunteer service as member and committee chair (2004-10) of the [Professionalism Committee](#) of the State Bar of Montana. This active, creative committee is charged with fostering professionalism among Montana attorneys and educating bar members about their responsibilities under the Montana Rules of Professional Conduct. As a part of that committee, I
- Assisted in developing the New Lawyers' Workshop (formerly known as Rookie Camp) and numerous, original, Ethics CLE Programs such as "Ethics Jeopardy", and "Who Wants to Be Publicly Sanctioned" (modeled after Who Wants to Be a Millionaire), and "Ethics Bowl" (modeled after College Bowl).
  - Lead numerous "Road Show" CLE programs as a mechanism for revitalizing local bar associations and delivering free ethics CLE to association members.
  - Created original CLE seminars at the Annual Meeting including "Hot Topics for

Montana Lawyers”, and “The Seven Habits of Highly Effective Lawyers”.

B. My service as Justice of the Peace *Pro Tem* in Missoula County Justice Court Dept. II (2001 – Present). In that position, I

- Presided over bench and jury trials for various civil matters (i.e. claims involving breach of contract, landlord-tenant disputes, collections, etc.) and misdemeanor criminal matters (i.e. traffic offenses, DUI, partner/family member assaults, etc.);
- Conducted initial felony appearances and set bail;
- Accepted plea agreements, imposed sentence, and decided petitions to revoke;
- Conducted hearings on temporary orders of protection; and
- Presided at wedding ceremonies (50+ weddings); and
- Completed other duties expected of a justice of the peace.

51. Please identify the nature and extent of any pro bono work that you have personally performed during the last five years.

Most of my *pro bono publico* service has been bar-related service (i.e. service to the American Bar Association and the State Bar of Montana). However, I have also performed the following *pro bono publico* service to clients in the past five years:

- Serving as a court-appointed, *pro bono* conservator (*In the Matter of the Guardianship of LHA, a minor*; Missoula County Cause No. DG-10-102 (appointed by Judge Ed McLean));
- Advising the Montana Legal Services Association (the organization, not its clients) on employment law matters; and
- Represented and settled a debt-collection case against my *pro bono* client (defendant) (assigned through the WMBA Pro Bono Program).

52. In the space provided, please explain how and why any event or person has influenced the way you view our system of justice.

More than any event or person, I’ve been struck by the multitude of *pro se* litigants in our system who are often failed by an overly-complex process. I’ve seen first-hand while serving as justice of the peace *pro tem* how so many good citizens are bewildered and scared by the rules and proceedings when all they want is to be *heard*.

I’ve come to realize that many litigants (whether represented or *pro se*) never feel heard in their experience with the court system. They feel slighted, disregarded, and diminished. Decisions are issued in dry, written opinions from judicial chambers. Their feelings about the system often cause more work for judicial officers as the litigants seek appeal or reconsideration of the misunderstood decision.

**I've watched (and modeled) the good judges take the time necessary to listen to their stories and glean the kernels of information from the chaff that is presented – to have patience.**

53. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

**I believe the following qualities, which I believe I possess, are critical to be a good district court judge:**

- **The ability to suspend (or at least reserve) judgment until presented with sufficient facts and law to make a reasoned decision. This quality encompasses open-mindedness, fairness, and a temperate disposition.**
- **A sincere interest in people, which translates into the willingness to listen and to explain the actions of the court, and to be respectful of the litigants.**
- **An ability to assess the credibility of witnesses based upon the content of their character and statements, and not on external factors such as look, dress, station in life, or mannerisms.**
- **The ability to render a clear and definitive decision, and explain that decision clearly and concisely.**
- **Humility. Driving the above must be a humble spirit. Our judicial system is an imperfect, human endeavor. A good district court judge must have a grounded sense of self that motivates the judge to do right, be fair and always learn.**

54. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

**Our legal system requires adherence to statutory law and case law precedent to foster predictability and certainty. Attorneys and the public, alike, need to know what the law expects and the confines for appropriate action. It should be the rare situation that statutory law or precedent isn't closely followed, and then only if the statute or decision is ambiguous or incomplete.**

**A district court judge is charged with applying established law and precedent to the specific facts of the case. The flexibility in the law comes through this application. No two cases are truly identical.**

**As a district court judge, I would follow the established law, even if I didn't personally agree with it. The Montana Supreme Court is the final arbiter of state law, and has the authority to overrule precedent or determine the constitutionality of a statute. If I were convinced the existing precedent was wrong, I would write a well-reasoned decision that**

adhered to the precedent while pointing out the infirmities of the precedent to the Montana Supreme Court.

55. In the space provided, state the reasons why you are seeking office as a district court judge.

**I have the skills and temperament to be an excellent judge. I am analytical, thorough, and hard-working. I am fair and objective. I can be decisive and explain the reasons for my decisions. Regardless of their station in life, litigants before me would receive respect and be heard.**

**I bring a background in civil law that is much needed in our 4<sup>th</sup> Judicial District. I have 21 years of private practice experience representing individuals, small businesses, non-profits and large corporations. I know the difficulties of litigation, and the impact it has on people. I recognize the costs of private litigation, and will endeavor to keep civil cases moving toward resolution without unnecessary hurdles. As judge, I would take an active role in managing discovery disputes to prevent abuses and delay.**

**Finally, I have the energy, interest and initiative to do more than simply serve the judicial system, but to improve it. My bar service has exposed me to the broader picture of our profession and administration of justice. Montana's court system is unique, but it should not be insular. I would enlist the bar in developing practices and procedures to make the litigation process and courts more efficient and effective.**

56. What items or events in your career have distinguished you or of which you are most proud?

**Three items come to mind. First, I am extremely proud to have served the legal profession in the various leadership positions at the local, state and national levels of the bar. A high point of my career was serving as President of the State Bar of Montana. Through that position, I had an extraordinary opportunity to meet many Montana attorneys and discuss the issues that mattered most in their personal and professional lives.**

**Second, I am intensely proud of the client base I serve. I have *the best* clients who, even knowing I must give up my private practice (and thus them) should I receive appointment to the bench, nevertheless *volunteered* to write letters of support and help me achieve *my* goal of becoming a judge. They have said in sum, "Shane, you have taken care of us so well over these years, it's time we returned the favor." I have been truly humbled by their response.**

**Third, I am proud of the high-quality, legal services I have provided to my clients over the years. I have sparred with attorneys from some of the most prestigious law firms in the country (and internationally) and obtained positive results for my clients. I have spent late nights and weekends when a client needed immediate attention and help to allay fears and help them sleep.**

57. State any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

**There is no additional, pertinent information that has not been discussed or disclosed elsewhere in this application and accompanying exhibits.**

58. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge candidate?

**Yes, I believe there are a few factors or qualities that make me uniquely qualified, above other candidates, for *this* judgeship:**

- a. I have an eastern Montana, farm-boy work ethic. I work until the job gets done. I don't plan to abandon that work ethic if I am appointed and become a public employee. This is *not* my retirement job (although I hope to serve for many years). I can and will remain current on my case load.**
- b. I am technology-savvy, and understand the increasing role technology has in evidence, electronic discovery, presentation, research and organization. Through legal work with my network forensics and security clients, I am keenly aware of the limitations and threats technology poses to the unwary.**
- c. I have a common-sense and practical approach to interpreting and administering the law.**
- d. As well-evident from my balance of private practice, volunteer service, and personal life, I have energy to devote to this position.**

**I would appreciate the honor of serving as district judge in the 4<sup>th</sup> Judicial District.**

## I. CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 4th Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

February 11, 2015

(Date)

/s/ Shane A. Vannatta

(Signature of Applicant)

-----

A signed original **and** an electronic copy of your application and writing sample must be submitted by  
***5:00 p.m. on Thursday, February 19, 2015.***

**Mail the signed original to:**

**Lois Menzies  
Office of Court Administrator  
P.O. Box 203005  
Helena, MT 59620-3005**

**Send the electronic copy to: [MTsupremecourt@mt.gov](mailto:MTsupremecourt@mt.gov)**

Application form approved 7/10/93  
Revised 9/15/2009

APPLICATION FOR

DISTRICT COURT JUDGESHIP  
4th Judicial District

**Exhibit A**

(Writing Sample for Shane A. Vannatta)



Shane A. Vannatta, Esq.  
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Attorneys for Defendant Viacom International Inc.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

TODD DAMASE OUELLETTE, Plaintiff,	CV 10-133-M-DWM-JCL
vs.	<b>DEFENDANT'S BRIEF IN SUPPORT OF 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS</b>
VIACOM INTERNATIONAL INC., a Delaware Corporation Defendant.	<b>(Viacom International Inc.)</b>

Defendant Viacom International Inc. ("Viacom"), by and through their counsel of record, hereby submit this brief in support of its motion for judgment on the pleadings.

**Factual And Procedural Background**

This case arises out of a *pro se* Complaint for Declaratory and Injunctive Relief (dkt #2) filed by Plaintiff Todd Damase Ouellette on November 30, 2010. Because of several defects in Plaintiff's Complaint, the Court allowed Plaintiff an opportunity to amend his pleading to comply with Rule 10(b) (dkt #4).

Plaintiff filed an Amended Complaint (dkt #5) on February 7, 2011. The Court accepted the Amended Complaint (dkt #6), but later the U.S. Magistrate Judge issued Findings and Recommendations dismissing Counts II – VIII (dkt #19). District Judge Molloy adopted the Findings and Recommendations (dkt #29). As a result, the sole remaining claim at issue was Plaintiff’s Count I for misrepresentation under the Digital Millennium Copyright Act of 1998 (17 U.S.C. § 512(f)).

Defendant Viacom appeared and Answered Count I of Plaintiff’s Amended Complaint (dkt #22), denying any and all liability. Viacom specifically denied making misrepresentations to either Plaintiff or any third-party websites. In doing so, Viacom noted that the information relied upon by Plaintiff for the alleged proof of misrepresentation (Exhibit #2 to the Amended Complaint<sup>1</sup>) was an email that Viacom was not responsible for preparing or forwarding.

In response to the Court’s scheduling Order (dkt #33), Plaintiff filed another Amended Complaint (dkt #36) (“Second Amended Complaint”). Plaintiff’s stated purpose in filing this Second Amended Complaint was to “clean up the complaint so it is easier for all involved to reference.”

Like prior iterations of his Complaint, Plaintiff alleged that Viacom misrepresented its claim of copyright infringement when it issued takedown notices through its agents to Plaintiff. However, Plaintiff changed the facts supporting his misrepresentation claim as follows:

Every time I critiqued a video clip of a program produced by defendant, I was hit w/ a take-down notice based on a false claim of copyright infringement made “under penalty of perjury.” I filed a counter notice in every instance and each

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<sup>1</sup> The Original Exhibits submitted with Plaintiff’s Amended Complaint (dkt #5) are “On File In the Clerk of Court’s Office” and were not scanned into the CM/ECF system. See Rule 10(c), Fed. R. Civ. Pro. (“A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. **A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.**”) (emphasis added).

time that the counter notice was properly processed by Youtube's Copyright Team, **Defendants admitted (via acts not direct wording) the video was Fair use.** But, they often filed multiple claims against certain videos, and refused to stop harassing me w/ false claims even though they knew it was leading to permanent destruction of my three Youtube accounts. (see Exhibit #2 Threatening Email)

Second Amended Complaint (dkt #36) at 2 (**emphasis added**). According to this latest pleading, Plaintiff now relies on acts alone, as opposed to affirmative statements made by Viacom, to support his claim of misrepresentation.

As a result of this change in pleadings and Plaintiff's failure to plead facts that show his use is authorized by law, Defendant Viacom files the subject motion for judgment on the pleadings under Rule 12(c), Fed. R. Civ. P.

### **Legal Standard**

Rule 12(c) provides that "[a]fter the pleadings are closed -- but within such time as not to delay the trial -- any party may move for a judgment on the pleadings." Fed. R. Civ. Pro. 12(c). A Rule 12(c) motion challenges the legal sufficiency of the opposing party's pleadings by considering all of the pleadings as a whole. *Abston v. City of Merced*, 2009 WL 3398809, \*3 (E.D. Cal., Oct. 20, 2009) (citation omitted); *Curran v. Cousins*, 509 F.3d 36, 43 (1st Cir. 2007). Rule 12(c) is "functionally identical" to Rule 12(b)(6) and "the same standard of review applies to motions brought under either rule." *Cafasso, U.S. ex rel. u. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1055 n. 4 (9th Cir. 2011) (internal quotation marks omitted). As such, the Court must "inquire whether the complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief." *Cafasso*, 637 F.3d at 1054 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009)). Judgment on the pleadings is proper "when, taking all the allegations in the pleadings as true, the moving party is

entitled to judgment as a matter of law.’” *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1042 (9th Cir. 2005) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001)).

In considering a Rule 12(c) motion, the court must accept the facts as pled by the non-movant. *Cafasso*, 637 F.3d at 1053. A claim is plausible on its face when the plaintiff pleads “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2009)). Although a Court must construe the pleadings in the light most favorable to the nonmoving party, a court need not accept the plaintiff’s legal conclusions or unwarranted factual inferences as true. *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008).

In ruling on a Rule 12(c) motion, a court may not consider matters outside the pleadings without treating the motion as a motion for summary judgment. *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990).

Although *pro se* complaints are given liberal construction, even a *pro se* complaint can be dismissed in the “absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacific Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988); *see also Castro v. United States*, 540 U.S. 375, 386, 124 S. Ct. 786, 794 (2003) (Scalia, J., concurring in part and concurring in judgment) (“‘Liberal construction’ of *pro se* pleadings is merely an embellishment of the notice-pleading standard set forth in the Federal Rules of Civil Procedure.”).

### **Discussion**

The substance of Plaintiff’s allegations is that Viacom’s takedown notices issued to video hosting sites YouTube and Myspace misrepresented that Plaintiff’s

videos infringed copyrights owned or policed by Defendant. Plaintiff argues not only that his use is fair use, but that Viacom and its agents allegedly knew this.

Plaintiff's Second Amended Complaint attempts to allege a claim of misrepresentation under Section 512(f) of the Digital Millennium Copyright Act (DMCA). That section provides:

Any person who **knowingly materially misrepresents under this section--**

(1) **that material or activity is infringing**, or

(2) that material or activity was removed or disabled by mistake or misidentification,

**shall be liable for any damages**, including costs and attorneys fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

17 U.S.C. § 512(f) (**emphasis** added).

In the context of Plaintiff's claim, the actionable misrepresentations relate to the takedown notices issued by Viacom and its agents pursuant to 17 U.S.C. § 512(c)(1)(C) and (c)(3). In issuing takedown notices, Viacom and its agents must include, *inter alia*:

(v) A statement that the complaining party has a **good faith belief** that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

17 U.S.C. § 512(c)(3) (elements of takedown notification) (**emphasis** added).

Plaintiff alleges that Viacom lacked such good faith belief.

The "good faith belief" requirement of the DMCA establishes a subjective rather than an objective standard upon the party issuing the takedown notice. *Rossi v. Motion Picture Assn. of America, Inc.*, 391 F.3d 1000, 1004 (9th Cir. 2004).

Defendants such as Viacom are only liable for a “knowing misrepresentation” made without a “good faith belief”. *Id.* at 1004-05. “A copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake.” *Id.* at 1005. Thus, a claim against the copyright owner for misrepresentation must be based upon the copyright owner’s subjective bad faith. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1155 (N.D. Cal. 2008) citing *Rossi* at 1155.

However, “[a]n allegation that a copyright owner acted in bad faith by issuing a takedown notice without proper consideration of the fair use doctrine is sufficient to state a misrepresentation claim pursuant to Section 512(f) of the DMCA.” *Id.* at 1154-55. Succinctly put, Viacom may be held liable for a misrepresentation under the DMCA if it subjectively knew (i.e had actual knowledge) that Plaintiff’s use of the copyright-protected materials was fair use, but proceeded to demand its takedown anyway.

Therefore, based upon the above statutes and case law, in order to survive a motion for judgment on the pleadings, Plaintiff must plead facts which, if proved, tend to show two things: (A) that his use of the copyright-protected works was fair, and (B) that Viacom acted without a subjective good faith belief that Plaintiff’s use constituted copyright infringement. He has done neither.

**A. Plaintiff’s Complaint Contains Conclusory Allegations That His Use Is Fair Use.**

In order to proceed with his misrepresentation claim under 17 U.S.C. § 512(f), Plaintiff must first show that his use is authorized by law. In his Second Amended Complaint, Plaintiff merely claims “fair use” without elaborating on the basis of this general claim. The fair use statute provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work...for purposes such as criticism,

comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

*Id.*

Plaintiff fails to make any factual allegations of how his use meets the fair use requirements other than “I exorcized (sic) my Fair Use right to critique Viacom’s Comedy Central TV programs by posting videos to three Youtube accounts . . . .” Because Plaintiff’s allegations fail to address the nature of the copyrighted works or the character, amount or effect of his use, his allegations are insufficient. Given the statute’s requirements, this Court cannot infer fair use.

The District Court opinion in *Lenz* serves as a useful comparison for analyzing Plaintiff’s fair use claim. In 2007, Stephanie Lenz published a video on YouTube of her children dancing to a song by the music artist Prince. The video was only 29 seconds long and contained approximately 20 seconds of a Prince song, but only as background music. Universal, the copyright holder, issued a takedown notice. *Lenz* at 1152. Lenz filed suit, alleging misrepresentation under § 512(f). Universal responded seeking dismissal of the complaint under Rule 12(b)(6), Fed. R. Civ. Pro. Because Lenz’s pleadings included a factual summary



of the allegedly infringing use, the court found that the facts adequately provided the court with at least a basic understanding of the content of the video at issue, its character and nature, and the relative amount and substantiality of the copyrighted material used. *Id.* at 1152. In sum, based solely on the pleadings, the Court inferred that Lenz's use of copyrighted material appeared from the facts to be *de minimis* and therefore the court could further infer potential fair use by her.

Here, unlike in *Lenz*, Plaintiff's pleadings lack any discussion of whether his use is authorized by law. Therefore, even accepting Plaintiff's factual allegation in the Second Amended Complaint as true, and even applying the liberal pleading standards required of *pro se* litigants, Plaintiff's conclusory allegation of fair use does not state a claim under 17 U.S.C. § 512(f). Plaintiff's Second Amended Complaint should be accordingly dismissed.

**B. Plaintiff's Second Amended Complaint Fails To Allege Viacom's Lack Of Subjective Good Faith (i.e. Misrepresentation).**

Additionally, Plaintiff must allege Viacom's lack of subjective good faith to proceed with his misrepresentation claim under 17 U.S.C. § 512(f). This Court previously reviewed Plaintiff's Amended Complaint (dkt #22) and found that it stated a claim of misrepresentation under *Lenz*:

Ouellette's Amended Complaint at least states a claim of misrepresentation under 17 U.S.C. § 512(f) as recognized in *Lenz*. From a pleading standpoint, Ouellette's allegations satisfy the subjective bad faith element of his claim – **he contends Defendants agreed that Ouellette made fair use of their copyrighted materials**, yet Defendants continued to assert false claims of copyright infringement against Ouellette in their take down notices.

Order [Accepting Plaintiff's Amended Complaint] dated Feb 7, 2011 (dkt #6), at 4 (**emphasis added**).



With the filing of Plaintiff's Second Amended Complaint, Plaintiff's allegation of misrepresentation has materially changed. Instead of simply alleging that "Defendants admitted the video was Fair Use," he now qualifies the allegation: **"Defendants admitted (via acts not direct wording) the video was Fair use."** His change tacitly acknowledges that Viacom made no affirmative statements or communications from which a misrepresentation claim could arise. Plaintiff's claim, therefore, is that *Viacom's acts or conduct admits that Plaintiff's use was fair use.*

Moreover, Plaintiff's Second Amended Complaint contains minimal allegations of actual affirmative acts performed by Viacom and no factual allegations of acts that admit Plaintiff's use is fair use. The only statement that comes close is on page 3, where Plaintiff states

[e]mails prove Viacom's Stanley Pierre-Louis was behind the Viacom acts of perjury. See Exhibit #7 Stan Lewis Perjury and Exhibit #9 Bay TSP Copyright Claim.

Second Amended Complaint (dkt #36) at 3. The cited Exhibit #7, however, provides no such statements or acts of "admission". Rather, the exhibit is merely an email from Corporate Relations at Viacom (corprel@viacom.com), allegedly in reply to an email from the Plaintiff (toddouellette@mail.com). In the original email, Plaintiff states that he emailed

Stanley Pierre-Lewis about this last yr. And it never got resolved...Still no response even though he knows the vids are fair use. It sure is a good thing I am so mentally stable. I hate to imagine what would happen if you harassed someone who was not mentally stable.

In reply, corprel@viacom.com said,

Mr. Pierre-Louis is the most senior authority on these matters for our company. His decisions are Viacom's decisions.

Original Exhibits to Complaint filed Jan 05, 2011 (Doc 5-1), Exhibit #7 (on File in Clerk of Court's Office).

The only other exhibit which involves Plaintiff's misrepresentation claim is Exhibit #9. This exhibit is allegedly an email from BayTSP, Inc., acting as an agent of Viacom. The email's subject is "Notice of Unauthorized Use of Intellectual Property," and it states, "BayTSP has reasonable good faith belief that use of the material in the manner complained of in the below report is not authorized by the Rights Owners, their agents, or the law." Original Exhibits to Complaint filed Jan 05, 2011 (Doc 5-1), Exhibit #9 (on File in Clerk of Court's Office).

In light of the foregoing, none of the other exhibits referenced in the Second Amended Complaint allege any specific action on the part of Viacom or its agents. Moreover, none of the exhibits refer, on any substantive level, to allegations of either fair use or misrepresentation.

In contrast, to show bad faith in the *Lenz* case, Lenz articulated specific allegations that Universal acted solely to satisfy Prince, who had been "outspoken on matters of copyright infringement on the internet and...threatened multiple suits against internet service providers to protect his music." *Lenz* at 1152. In 2007, Prince publicly stated he was attempting "to reclaim his art on the internet." *Id.* "Lenz allege[d] that Universal issued the removal notice only to appease Prince because Prince 'is notorious for his efforts to control all uses of his material on and off the Internet.'" *Id.* Further, Lenz asserted that "Prince himself demanded that Universal seek the removal" of the video, and that "Universal sent the [takedown] notice at Prince's behest, based not on the particular characteristics of [the video] or any good-faith belief that it actually infringed on a copyright but on its belief that, as a 'matter of principle' Prince 'has the right to have his music removed.'" *Id.* at 1153.

APPLICATION FOR

DISTRICT COURT JUDGESHIP  
4th Judicial District

**Exhibit B**

(Profile of Shane A. Vannatta)

## From farm boy to Bar leader

*A fresh pair of leather gloves for the start of a new chore*

**S**hane Vannatta, the Missoula attorney who assumed the presidency of the State Bar of Montana in September, hails from small-town Eastern Montana. His humble, farm beginnings and varied background brings a unique skill set to the Bar.

Shane Anthony Vannatta, 43, was born in Williston, N.D., and raised through the age of 7 in Parshall, N.D. While in Parshall, his parents owned and operated a propane delivery service out of an old bank building. He and his brothers – Shane is the second oldest of four boys – would take naps in the old bank safe where his parents maintained a small apartment. Shane attended Head Start, but later discontinued it at his request. He boasted to people on the street in front of his parents' business that he was "a Head Start drop-out."

In 1974, his parents purchased the Vannatta family farm and a neighboring farm owned by an uncle, and moved 10 miles north of Bainville, Mont. Bainville is a town of approximately 300-350 people located on the Hi-Line near the North Dakota border. Its claim to fame was once having been saluted on Hee Haw: "Corn Field County salutes Bainville, Montana – population 300. SAL-UTE!"

**ON THE FARM,** Shane did all the tasks of an agricultural life – fencing, summer-fallowing, haying (including bucking hay and straw bales), harvesting, feeding the animals, branding, butchering, cleaning pig pens and chicken coops and barns, milking the cow (her name was Esther), herding cattle and sheep, etc. Shane "knew a new season of work was upon him when he received a fresh pair of leather gloves – usually at the beginning of summer."

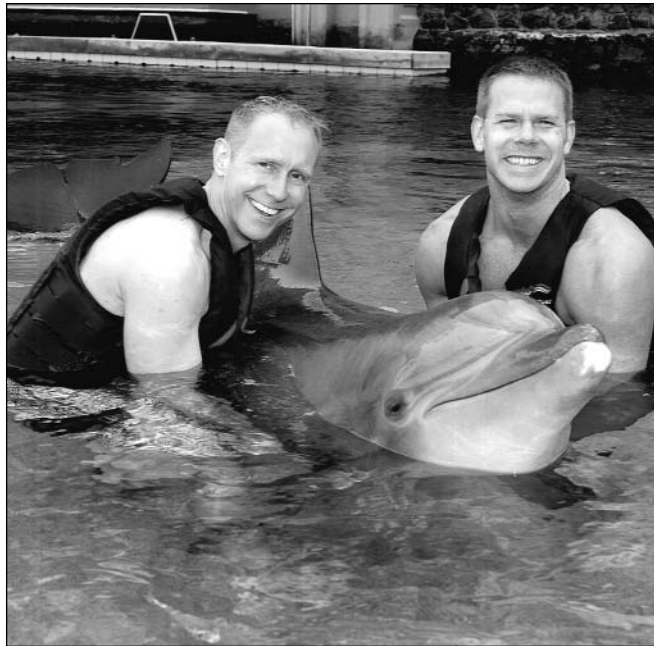
Shane's summers were long, lonely, and full of work. He clearly remembers several times making little mudballs with spit and the dirt that had settled on his arm after several dusty rounds of summer-fallowing or baling hay. As a result, he

believes lawyering in a climate-controlled office is rather cushy.

**LUCKILY, SHANE MADE IT** off the farm alive. He learned to drive when he was eight, and had his first major accident by the age of 14 – before he had a driver's license.

Shane rolled his father's favorite pickup truck (a red 1972 Ford F150) two and half times after over-correcting on a curve in the gravel road. He awoke from the accident upside down with his legs pinned by the steering wheel, which was a good thing since he wasn't wearing a seat belt. His left arm was crushed because he instinctively put it outside the open driver's-side window when the pickup rolled.

After slipping out from the steering wheel and dropping to the ceiling of the nearly flattened cab, he had to push himself through the shattered windshield to get out of the pickup; he still bears the scars where the broken windshield dug into his back as a pushed himself out.



Shane Vannatta, left, and his life partner Jon Freeland living The Life Aquatic.

**SHANE BELIEVES** growing up on a farm in a rural, Montana community taught him some important life lessons: (1) Animals die without regular care, therefore he needed to be reliable; (2) Life is hard, but can be awfully fun; (3) Some of the best fun comes from the simplest pleasures, like being pulled behind a snowmobile on the hood of an old car; and (4) Rain means a day off! (Shane still feels this way and enjoys a good summer rainstorm.)

Shane's father required him and his brothers to take Vocational Agriculture (VoAg) in junior high and high school because he wanted his boys "to know something." Taking VoAg also meant he needed to join Future Farmers of America (FFA).

One of the key skills he learned in FFA was parliamentary procedure, and contests were held at the local and state level. Shane was on the winning or runner-up state parliamentary

procedure team three of his four years in high school. After surviving those cutthroat competitions, Shane believes chairing the State Bar Board of Trustees' meetings were a breeze.

Because Shane's high school was so small (120 students in K-12), every student had to pitch in. When Shane graduated in 1986 as co-valedictorian, he was serving as the student body president, the senior class president, the FFA vice-president, the B-Club (Letterman's Club) treasurer, the co-editor of the school newspaper, the emcee of the Show Choir, and the captain of the basketball team (he reports that his team was one win and "a whole bunch of losses"). The graduation photos of Shane's class hang in the halls of Bainville High School together with the class photos of his 3 brothers, 10 aunts and uncles, and several cousins.

Shane attended the University of Montana where he graduated with high honors in Political Science. When Shane first arrived at UM, he felt rather insignificant; his first dorm, Craig Hall, had more residents (356) than his home town. He initially declared in Radio/TV Broadcasting hoping to be the next Tom Brokaw. He later discovered that he didn't have the desire to poke a microphone in someone's face hoping for quote.

It was during his senior year that Shane picked up Taekwondo to earn some remaining gym credits for graduation. After a few self-defense classes, he was so excited with kicking and punching that he took additional, non-credit class-

es. Taekwondo would carry him through the following three years of law school, and he credits the sweaty workouts with maintaining his sanity. Shane now holds a fourth dan (degree) black belt in Taekwondo. Coincidentally, he tested for his first dan (degree) black belt two days after completing the bar exam, using the stress of the bar exam to propel him through the test.

Shane attended UM Law School from 1990-1993. He

served as an editor and the business manager for the *Montana Law Review*. He graduated with honors from law school in the spring of 1993; the honors part was a surprise to him, resulting from an especially good last semester.

**AFTER GRADUATION**, Shane joined the law firm of Worden, Thane & Haines (now simply Worden Thane), where he interned during law school. He became a shareholder in January 2001. Shane speaks proudly of his firm's

long commitment to community and bar service, pointing to numerous members of the firm who have served in leadership positions (such as Molly Shepherd, president of the State Bar of Montana from 2000-01).

Shane's practice was principally shaped by some of his early clients, who needed specialized legal help in trademark



Shane, right, with his three brothers on the Bainville-area farm.

**More on SHANE VANNATTA, Page 23**

## Shane on his financial state:

"My parents drove me the 10 hours from Bainville to Missoula for my first day [at the University of Montana]. My parents didn't have much and were limited to buying me a new winter coat. They told me later that they sat quietly for several hours before talking about not having the money to buy me a small TV to outfit my sparse room. Luckily, I was paired with a roommate who had an abundance of material possessions (including a TV), which he was willing to share with me.

"I remember eating a lot of cereal and

Top Ramen (18 packages for a buck) on the weekends because I could only afford one meal in the Food Service on the weekends – I was on the C meal plan, giving me two meals per day on the week days, and one meal per day on the weekends. I've only now, 24 years later, started eating ramen noodles again.

"I was lucky to receive an abundance of financial aid – scholarships and work study, and worked at the Office of Research Administration in Main Hall on campus. The staff and administration in the office were very kind and supportive

of me, frequently calling over to the Financial Aid Office to increase my work study allotment (when I ran out), and providing me employment in the summers when I didn't receive work study.

"In my senior year, I needed to purchase my first computer and printer. The assistant VP for Research, at the request of a staff member, extended me a 'graduate scholarship' for \$1,600 with the proviso that I would donate the money back over time. I received the funds and paid (donated) the loan back over the next four years. I used that computer and printer extensively for studies and work."

and copyright law. He fondly recounts forming Big Sky Brewing Company, Missoula's home-grown craft brewer of Moose Drool, six days after swearing-in to the State Bar of Montana. He maintains a general practice in business formation, development and sales; trademark, copyright, and trade-secret law; employment law; contract law; and related civil litigation.

Shortly after graduating from law school, Shane met his life partner, Jon Freeland. Although they had known each other for at least two years prior, it was after Jon broke his leg while skiing (and Shane racing him back to Missoula for treatment) that they came together. Both have received incredible support from their families; indeed, Jon's parents and grandmother, as well as Shane's mother (Shane's father died more than three years ago) attended the 2011 Annual Meeting Banquet to watch Shane take the presidential gavel.

Shane has served as the president of the Missoula New Lawyers Association, chair of the State Bar New Lawyers Section, president of the Western Montana Bar Association, and chair of the Board of Trustees of the State Bar of Montana. He chaired the State Bar's Professionalism Committee for more than five years. Shane served a seven-year term as chair of the WMBA Pro Bono Program, and was instrumental in the organization of that program. In 2010, he was elected president-elect of the State Bar.

**THE MONTANA LAWYER** asked Shane several questions relating to his Bar presidency; his answers follow:

■ **What are your top goals for the State Bar of Montana in the following year?**

Recognizing that my year as president may be defined by circumstances and issues beyond my control, my top four goals for my term are: (a) to seek the self-funding of Supreme Court commissions and develop alternate sources of revenue so we can avoid any dues increase; (b) to increase affordable offerings in law-related technology CLE; (c) to disseminate the good work of the State Bar and its volunteers and staff on increasingly popular portals such as Facebook and Twitter, and (d) to re-develop the Annual Meeting, Road Show, and New

Lawyers Workshop to increase member participation and reduce cost.

■ **You have led the recent efforts to review the State Bar bylaws and recommend revisions to them. Do you foresee any major changes in the State Bar's operation?**

No. The bylaws review was largely an update to conform to our standard operating practices and provide guidance to the staff on Bar procedures. Through the fine work of Randy Snyder, Chris Tweeten and Lynda White, we simply revised language to make the bylaws clearer and more understandable. We still have a review of the Board [of Trustees] policies next.



Shane and his nephews practice Taekwondo.

■ **What jumped out at you from the 2011 State Bar Member Survey?**

The aging of our membership was key. According to the survey, 46 percent of our membership is over 50. I worry about a mass exodus of retirees from the bar in the years to come and wonder how we can harness that talent. Additionally, for all those attorneys leaving the practice of law, we, the State Bar, need to be prepared to assist them in their transition.

■ **What is the most important lesson you have learned as a lawyer that they didn't teach you in law school?**

There are so many lessons. Chief among them would be the necessity of maintaining objectivity with your clients. Client problems often touch on more than merely legal matters. I have immense appreciation for how clients often view lawyers as trusted business and personal counsel, not just legal counselors. So many times I have been asked my opinion on business or personal issues that have very little to do with the law. After first explaining that I'm not qualified as an expert in that area, I find myself giving some suggestions or feedback on the particular issue based upon my own experience in business and with interpersonal communications. Attorneys often occupy an honored and important position in the lives of their clients.

Law school didn't prepare me for the close relationships you develop with clients as their trusted advisor and counselor. Maintaining separation, objectivity and professionalism are important even when the client seeks your participation in company picnics, wedding ceremonies, business openings, and family gatherings. Indeed, many clients want you to be their friend and advisor. Good attorneys can have a friendship while maintaining professional distance and objectivity. If you don't,



your advice is no longer sound.

### ■ How do you reconcile time spent in State Bar leadership positions with a busy law practice?

My service to the Bar has been a needed respite from my busy law practice, although it is tough to balance the competing demands. Bar service places my legal practice in a context; I don't feel like a mere cog in the legal machinery of a firm or the legal system. I have the advantage of seeing the bigger picture, and that motivates and excites me about the practice.

Additionally, through Bar work, I have been exposed to some incredible attorneys within Montana and across the nation.

I must confess that service to the Bar does take its toll and certain sacrifices are made. I have fewer billable hours than many other attorneys. As a result, I repeatedly ask people who appreciate my service to please thank my partners at Worden Thane; they are the individuals most responsible for supporting my Bar work, and without them I would not be able to serve.

○

## Shane and the radiators

parents owned and operated a propane delivery service out of an old bank building . . . where my parents maintained a small apartment.

"I had an uncanny ability for running head-first into the old fan-style radiators, each time cracking my head. My Dad became quite adept at applying a butterfly bandage after watching the doctor repeatedly perform the task.

"After the seventh time running into the radiators as I played around the store, my parents decided to remove all the radiators and put them in a closet. I opened the closet door and ran head-first, again, into a radiator.


"They subsequently removed them from the store."

"I was raised through the age of 7 in Parshall, N.D. While in Parshall, my



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## DEFENDERS, from Page 5

The American University report also listed those problems, and the current leadership of the system has largely failed to address them, Taylor said in his Jan. 11 resignation letter to Gov. Brian Schweitzer.

Taylor said he's not surprised by the ACLU report, and that the Commission now has a chance to name a new chief public defender who will tackle the problems. But the Commission also has to exercise greater oversight, he added.

"They're supposed to set the policy and tell the chief public defender what to do," he said. "They've been going along too much with what the chief tells them to do."

Gillespie said a good deal of the problems fall back to the funding of the system, which he said is inadequate. Attorneys are being asked to do too much with not enough resources, and attorneys on contract are not being paid enough, he said.

Attorneys who get their first job out of college with the state generally start at \$40,000 a year, but if you're in the Office of the Public Defender, the chance to increase your pay with experience is less than that of other government lawyers, a survey of salaries showed last year. Also, the public defender system, when it has to hire outside lawyers on contract, pays them \$60 an hour – considerably less than the \$165 hourly rate paid by the federal government to lawyers hired to defend indigent criminal defendants.

The system's attorneys earn anywhere from \$40,000 to \$71,400 a year, depending on experience. Except for the starting salary, Gillespie says that level is about \$4,000 to \$7,000 less than attorneys in other government agencies can make.

Dave Stenerson, the former head of the Missoula regional office who took over as acting chief public defender in October, said he wants to take look closer at the report and talk to other system attorneys before responding. ○